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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MORGAN STANLEY & CO., INC., GOLDMAN, SACHS & CO., ERNST & YOUNG, and SALOMON BROTHERS, INC.,
Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE CO.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENT PACIFIC MUTUAL LIFE INSURANCE CO.

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QUESTION PRESENTED

The petition presents the following question:

"Whether Section 27A(b) of the Securities Exchange Act of 1934, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation of powers doctrine and the due process clause of the United States Constitution."

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 93-609

MORGAN STANLEY & CO., INC., GOLDMAN, SACHS & CO., ERNST & YOUNG, and SALOMON BROTHERS, INC.,
Petitioners,
v.
PACIFIC MUTUAL LIFE INSURANCE CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT PACIFIC MUTUAL LIFE INSURANCE CO.

STATUTE INVOLVED

Section 27A of the Securities Exchange Act, 15 U.S.C. § 78aa-1, provides:

> (a) EFFECT ON PENDING CAUSES OF ACTION.—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) EFFECT ON DISMISSED CAUSES OF ACTION.—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

STATEMENT

1. District Court Proceedings Before Section 27A.

In March 1991, respondent Pacific Mutual filed this action in the United States District Court for the Northern District of Texas, seeking damages for securities fraud committed by petitioners, who are various investment bankers and accountants.[1] The complaint alleged that petitioners had made various false or misleading statements in connection with certain securities transactions relating to the merger of Interfirst Corporation and RepublicBank Corporation. In addition to common-law fraud, the complaint asserted violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated under that section. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

Petitioners moved to dismiss on various grounds, but they did not invoke any statute-of-limitations defense. Pet. App. A3. The Fifth Circuit had held that, in the absence of a federal limitations period applicable to 10b-5 actions, such actions were subject to the four-year statute of limitations borrowed from the law of Texas.

[1] Pursuant to Rule 29.1 of the Rules of this Court, Pacific Mutual states that it has no parent corporation and that its subsidiaries, other than wholly owned ones, are World-Wide Holdings Ltd. (a United Kingdom corporation) and United Planners Group, Inc. (an Arizona corporation).

Ibid. The suit, brought in March 1991 to recover for fraud committed in late 1987, was timely under that rule.

On June 20, 1991, while the motions were pending, this Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), and *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). The *Lampf* decision held that 10b-5 claims are governed by a "1-and-3-year" statute of limitations: suit for fraud must be brought within one year of discovery or three years of the fraud, whichever is earlier. 111 S. Ct. at 2782. The *Beam* decision made clear that, once a new judicial interpretation is applied to the parties in the case where it is announced, it must also be applied to other pending cases. 111 S. Ct. at 2446, 2448. The *Beam* ruling applied to the new 1-and-3-year rule because the Court in *Lampf* applied the rule to the parties before it. *Lampf*, 111 S. Ct. at 2782; *id.* at 2785-86 (O'Connor, J., dissenting).

On July 9, 1991, based on the newly applicable limitations period under *Lampf* and *Beam*, petitioners asked the district court in this case to dismiss the complaint as untimely. The district court granted the motion on August 16, 1991, noting that the suit was filed more than three years after the challenged fraud. *See* Pet. App. A4. As amended, the judgment of dismissal was entered on September 6, 1991, giving Pacific Mutual until October 6, 1991, to file a notice of appeal. *See* Fed. R. App. P. 4; Fed. R. Civ. P. 58. Having no sound basis for an appeal under then-applicable law, Pacific Mutual did not appeal.[2]

2. District Court Proceedings After Section 27A.

Less than four months later, on December 19, 1991, Congress enacted Section 27A of the Securities Exchange

[2] The common-law fraud claims, unlike the claims under federal securities law, were dismissed without prejudice. Pacific Mutual subsequently filed its common-law fraud claims in state court. J.A. 15 n.4.

Act (Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387) to address the problem caused by *Lampf*'s retroactive application to previously filed cases. The Act provided that 10b-5 actions commenced before the date of the *Lampf* decision (June 20, 1991) would be governed by the pre-*Lampf* limitations period applicable in the jurisdiction where suit was filed. Subsection (a) applied this limitations rule to cases still pending. Subsection (b) applied the limitations rule to cases, like this one, that had been dismissed under *Lampf*, allowing the plaintiff 60 days to seek reinstatement so that litigation on the merits of the complaint could proceed. Petitioner Morgan Stanley's General Counsel, testifying on behalf of the Securities Industry Association, far from raising any constitutional or even fairness objections, had urged precisely this result to Congress.[3]

Pacific Mutual filed for reinstatement on January 31, 1992. J.A. 5-8. In responding, petitioners did not dispute that the suit would be timely under the limitations period made applicable by Section 27A(b). *See* Pet. App. B5. Instead, they argued that Section 27A(b) is unconstitutional. J.A. 9-25. Specifically, they contended that Section 27A(b) "unconstitutionally encroaches on the powers of the judicial branch" (J.A. 10, 17) in two ways. First, petitioners argued, Congress had impermissibly directed a decision in a defined class of cases, thus violating the principle of *United States v. Klein*, 80 U.S. 128, 146-47 (1871). J.A. 16-20. Second, they urged.

[3] The SIA witness opposed an early proposal that made a new 3-and-5-year limitations period retroactive, deeming it unfair to defendants in cases "that were time-barred even under pre-*Lampf* standards. SIA strongly urges that the timeliness of all cases pending at the time of the *Lampf* decision—whether or not those cases since have been dismissed—should be determined by application of the law as it stood at that time." *Securities Investors Legal Rights: Hearing on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 91-92 (1991); *id.* at 77-78. The statement, like Section 27A(b), makes no distinction between "final" dismissals and those on appeal.

Congress had impermissibly disturbed final judgments, thus violating the principle of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). J.A. 16, 19-23. Petitioners did not mention the Fifth Amendment, although they used the phrase "vested right." J.A. 16.

The district court held Section 27A(b) unconstitutional and thus denied reinstatement of the 10b-5 action. Pet. App. B1-B15. The court first rejected petitioners' *Klein* argument, observing that, like the statute upheld in *Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992), Section 27A(b) changes the substantive law rather than usurps judicial power by commanding decisions. Pet. App. B7-B8. The court went on, however, to accept petitioners' argument that every final judgment creates a "vested" right that cannot be disturbed by legislation. *Id.* at B7, B8-B9, B14. The court also found Section 27A(b) invalid on the ground, concededly not urged by petitioners (Pet. App. B11), that even Congress could not deny retroactive application to the *Lampf* rule because *Beam* mandated retroactive application "as a constitutional matter." Pet. App. B14; *see id.* at B11-B14.

3. The Court of Appeals Decision.

The court of appeals reversed. Pet. App. A1-A33. Most of the court's discussion focused on petitioners' "vested rights" contention, now made as a substantive due process argument. Noting that retroactive legislation comports with due process if the retroactive application is justified by a rational legislative purpose (Pet. App. A19-A20, A25), the court found no proper basis for petitioners' assertion that "the rights created by judgments are sacrosanct above other due process rights." Pet. App. A20. The court then held that Section 27A(b) readily passes the rationality test, and indeed survives any heightened scrutiny as well, because petitioners' "conduct would not have been different if they would have foreseen § 27A(b)" and the statute affirmatively

"honor[s] the expectations of plaintiffs *and* defendants as they ascertained § 10(b) limitations law upon the filing of these suits before *Lampf*." Pet. App. A25 (emphasis added). The court of appeals likewise rejected petitioners' claim that Section 27A(b) "usurps judicial authority" in violation of Article III of the Constitution (Pet. App. A30), observing in particular that "§ 27A(b) takes no authority from the judiciary" and "leaves the final resolution of securities-fraud disputes to the courts." Pet. App. A31; *see id.* at A30-A33.

SUMMARY OF ARGUMENT

I. *Separation of Powers.* As relevant to this case, the Constitution's separation of powers imposes two complementary constraints on Congress in enacting a statute. First, Congress may not assign a non-judicial function to the Article III courts. Second, Congress may not itself undertake to exercise the "judicial power," impairing the functions left to the courts. Section 27A(b) cannot be faulted by petitioners on either ground.

The first prinicple is "the principle of *Hayburn's Case*," which is the sole basis of petitioners' separation-of-powers argument. *See* Pet. Br. 11. But that principle applies only to statutes in force at the time of a requested judicial decision, where the statute deprives the dispute of its character of a "case or controversy" by asking the court to make a decision that it knows is ineffective on its own in granting relief, but instead is merely a first step in a process requiring some further independent determination by the executive or legislative branches. In that situation, this Court has often held that the Article III courts must decline jurisdiction. The principle, however, has no application to, and has never been invoked to invalidate, a statute enacted *after* a final judgment has been rendered, based on the statute's effect on the prior judgment: such a post-judgment statute can have no effect on the "case or controversy" character of the judicial decision

at the time it was made. *Hayburn's Case* and its successors thus offer no support for petitioners' challenge to Section 27A(b) as impermissibly disturbing preenactment judgments.

The second relevant separation-of-powers principle, forbidding congressional exercise of the judicial power (with concomitant impairment of the courts' power), is properly not a matter of *Hayburn's Case* principles at all, but instead addressed by whatever doctrine is established by this Court's decision in *United States v. Klein, supra.* Petitioners have made no *Klein* argument, however, recognizing that no such argument could succeed. *See Robertson v. Seattle Audubon Soc'y, supra.* But even if this second principle could properly be associated with *Hayburn's Case*, Section 27A(b) would have to be upheld. Congress has not itself engaged in adjudication, but has merely altered the applicable law of limitations, and left for the courts the entire task of applying the governing law to the facts of particular cases and rendering decision. Congress therefore crossed no line defining the types of powers it may exercise in relation to judicial cases.

II. *Due Process.* Section 27A(b) readily meets the standard for assessing due process challenges to retroactive statutes that upset settled expectations. It is permissible for Congress to enact such statutes as long as the retroactive aspect rationally serves a legitimate purpose. *See, e.g., General Motors v. Romein*, 112 S. Ct. 1105, 1112 (1992); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Section 27A(b) meets that test because it rationally serves to protect the reliance interests of plaintiffs who sued under pre-*Lampf* understandings of the governing statute of limitations, while ensuring that a whole class of defendants accused of securities fraud are not allowed to escape liability without even having to answer the fraud charges. Indeed, these purposes, together with the implausibility of the

claim that Section 27A(b) actually upsets legitimately settled expectations at all, mean that Section 27A(b) survives due process scrutiny under any standard short of an absolute rule protecting "final judgments."

Petitioners make no sound case for such a rule, either generally or as applied here. This Court's precedents, which include a host of decisions that uphold laws disturbing final judgments, will not support a general rule of sanctity for final judgments. Fed.R.Civ.P. 60(b) and its precursors are inconsistent with such a rule. The basic interest at stake under the due process clause here, in protecting settled expectations, does not even justify categorically special, much less absolute, protection for judgment-based rights in preference to other forms of property rights. And petitioners' suggested rule would have the perverse result of penalizing plaintiffs who are diligent enough to press their rights and responsible enough to refrain from pursuing merely dilatory appeals.

In any event, if there are any judgments that warrant any special protection against legislative disturbance, the judgments affected by Section 27A(b) are not among them. These judgments, entered only months before the legislation was enacted, had no effect but to relieve alleged malefactors of having to answer fraud charges on their merits, based entirely on a determination that the suits were not timely filed—under an interpretation of the governing statute of limitations that itself was unexpected. The statute then simply removed the limitations objection from the case. There is no justification for an absolute, or even distinctively stringent, bar to legislation that thus reaches briefly back in time to eliminate a procedural defect to the consideration of serious charges on their merits, even if that defect resulted in an unappealed judgment.

ARGUMENT

Petitioners could not dispute the strength or legitimacy of Congress's purpose in enacting Section 27A(b)—to remove a procedural obstacle, resulting from a wholly unexpected change in applicable limitations periods, to the adjudication of securities-fraud claims on their merits. Instead, petitioners argue for an absolute constitutional rule rendering (some) final judgments sacrosanct: no matter how good the reason, "Congress may not strip a private litigant of the vested right to a final judgment rendered by a court of the United States." Pet. Br. 10. As applied in this case, petitioners argue, the suggested rule constitutionally entitles them to the preclusive effect of their judgment of dismissal so as to immunize them from having to answer the securities-fraud charges, even though Congress has (for unassailable reasons) made the sole basis of the dismissal—a statute of limitations—no longer applicable to the claim.

Petitioners rest this claim for a rule of sanctity of (certain) final judgments, and its application to invalidate Section 27A(b) in this case, on two constitutional constraints on congressional action. The first is the Article III principle reflected in *Hayburn's Case* and its progeny. The second is the due process clause of the Fifth Amendment.[4] But neither of those sources can sup-

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[4] Petitioners' brief phrases the due process argument as a claim about "the Fifth Amendment" (Pet. Br. 29) in an apparent effort to justify reliance on cases decided under the Takings Clause (*id.* at 35, 37). But the question presented in the petition for a writ of certiorari is by its terms limited to the "separation of powers doctrine and *the due process clause*." Pet. i (question presented) (emphasis added); *see also* Pet. 13, 16 (due process). A takings claim is distinct from, and not encompassed within, a due process claim. *See Yee v. City of Escondido*, 112 S. Ct. 1522, 1531 (1992); *see also id.* at 1531-34 (even a regulatory taking claim is different from, and not encompassed within, a physical taking claim). Accordingly, no takings claims is presented here.

In any event, if petitioners' due process attack on Section 27A(b) fails, as it does, the argument would fare no better re-

port petitioners' claim that Section 27A(b) is unconstitutional.

I. SECTION 27A(b) DOES NOT VIOLATE THE ARTICLE III PRINCIPLE OF *HAYBURN'S CASE*.

Having abandoned their earlier contention that Section 27A(b) is invalid under *United States v. Klein*, petitioners rest their entire separation-of-powers argument now on "the principle in *Hayburn's Case*." Pet. Br. 11 (Argument Heading I).[5] The contention that the constitutional doctrine of *Hayburn's Case* invalidates Section 27A(b) because the statute upsets a final judgment, however, is wrong for two independently sufficient reasons. First, the argument misunderstands *Hayburn's Case* and its progeny, which merely bar the Article III courts from *accepting jurisdiction* over certain disputes—namely, where the court knows, because of statutes in place *at the time*, that its judgment cannot itself afford relief. That principle provides no ground for *striking down a statute*, like Section 27A, enacted *after* a judgment: the "case or controversy" or "judicial" character of a judicial decision is not affected by a later-enacted statute. Second, even if petitioners were permitted to challenge the validity of this post-judgment statute as representing an improper exercise of judicial power, or impairment of the courts' function, by Congress—which is properly not a concern of *Hayburn's Case*, but instead of *United States v. Klein*,

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packaged as a takings claim. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-23 (1986); *see also United States v. Sperry Corp.*, 493 U.S. 52 (1989).

[5] As to *Klein*, *see* Pet. Br. 27 n.31; C.A. Br. for Appellees at 6 n.3 (in Fifth Circuit, petitioners preserved *Klein* point in one sentence, but made no argument). As the district court held, any such argument would fail because Congress prescribed a rule of law for the courts to apply, and thus exercised its own legislative power, when it enacted Section 27A(b); it did not assume the exercise of judicial power by directing judicial decisions. *See Robertson v. Seattle Audubon Soc'y*, *supra*.

a decision abandoned by petitioners as a basis for their challenge—petitioners' separation-of-powers argument would still fail. Congress in Section 27A did not make any adjudicatory decisions, but changed the law and left findings of fact, interpretation of law, and decision to the courts.

A. 1. *Hayburn's Case* was the beginning of a long line of authority establishing that Article III courts—restricted to the exercise of "judicial" power in "cases" or "controversies" (Art. III, §§ 1, 2)—may not be given functions that are not "judicial" in nature, including the rendering of advisory opinions. *See* 2 U.S. (2 Dall.) at 411-14.[6] Under the resulting doctrine, a court's task is not judicial in the constitutional sense if, *at the time it is asked to rule*, the statutes defining its jurisdiction render the court unable to give concrete relief, but instead treat the judicial decision as only the first step in a process requiring subsequent independent affirmative action to be taken by the Executive or Congress. Article III courts may not make such a decision.

In *Hayburn's Case*, for example, the circuit courts were directed to rule on veterans' pension claims, but the ruling was merely to be transmitted to the Secretary of War for the Secretary, and ultimately Congress, to decide if the claim should be paid. 1 Stat. 243 (1792). The opinions of several Justices, sitting as Circuit Judges, explained that the assigned task was not "judicial" because the statute defining the task subjected the decision, before it could have any effect, to the revision of non-Article III authorities. 2 U.S. (2 Dall.) at 411-14. The result was that the assigned task, amounting to performing the role of commissioners in an executive process, could not be accepted by an Article III court.

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[6] *See, e.g.*, L. Tribe, *American Constitutional Law* § 3-9, at 73 & nn. 2, 4 (2d ed. 1988); C. Wright, *Federal Courts* § 12, at 56-59 (4th ed. 1983).

The same circumstance—namely, that the jurisdiction-defining statute itself limited the court's power to grant relief—was present in every one of the other cases cited by petitioners (Pet. Br. 16-19) in which the Constitution was held to preclude jurisdiction in the Article III courts. In *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851), the Supreme Court dismissed, "for want of jurisdiction," an appeal from a damages award rendered by a district judge under a statute that expressly made the award subject to the post-judgment redetermination of the Secretary of the Treasury. In *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864), the Court held that, as an Article III court, it could not take jurisdiction over an appeal from a decision by the Court of Claims because the statute giving jurisdiction to the Court of Claims by its terms gave the Executive the authority " 'to revise all the decisions of that court requiring payment of money.' " *United States v. Jones*, 119 U.S. 477, 478 (1886) (quoting Chief Justice Taney's explanation in announcing judgment in *Gordon*); *see Gordon*, 117 U.S. 697, 703 (1885).[7] In *In re Sanborn*, 148 U.S. 222 (1893), the Court likewise held that it could not take jurisdiction over an appeal from certain Court of Claims decisions that were still subject to non-Article III revision.[8] And in *Chicago & Southern Air Lines, Inc. v.*

[7] Immediately after *Gordon* was decided, Congress repealed the provision subjecting the relevant Court of Claims decisions to executive revision, and those decisions thereby became fit for Article III review. *United States v. Jones, supra; see also La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899).

[8] In *District of Columbia v. Eslin*, 183 U.S. 62 (1901), the Court confirmed the principle of this line of cases when it held that it must dismiss an appeal because Congress had repealed the cause of action, making relief impossible. In *Muskrat v. United States*, 219 U.S. 346, 352-55 (1911), the Court again relied on the principle established in *Hayburn's Case*, *Ferreira*, and *Gordon* to hold that an Article III court may not render a purely advisory opinion (on a statute's constitutionality), where the decision would furnish no concrete relief. *See also United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934) (Article III courts cannot "give

Waterman S.S. Corp., 333 U.S. 103, 113-14 (1948), the Court held that Article III courts could not take on cases about the propriety of a Civil Aeronautics Board decision on the award of a foreign air carrier route, where the resolution of such a case, under the statute in place at the time, "ha[d] only the force of a recommendation to the President." *Id.* at 113.[9]

These cases thus establish a constitutional constraint on the jurisdiction assumable by Article III courts, *barring* such *jurisdiction* where statutes in place at the time of decision limit the court's relief authority and thereby make the decision requested of the courts something other than the "judicial" resolution of a "case or controversy." In this case, however, there was at all times a live case or controversy for the district court to resolve. The dis-

or review judgments" that, at the time, are "conditioned" on agency revisory authority).

[9] The other cases cited by petitioners are of no help to them on the constitutional issue. For example, *United States v. O'Grady*, 89 U.S. (22 Wall.) 641 (1874), held that once Congress had made the Court of Claims' cases into Article III controversies, subject to Supreme Court review, the *statute* meant that the Executive lacked authority to revise a Court of Claims judgment before paying it. *United States v. Waters*, 133 U.S. 208 (1890), likewise turned on a statutory conclusion. *ICC v. Brimson*, 154 U.S. 447 (1894), merely confirmed the ICC's authority to seek judicial enforcement of a subpoena. *Williams v. United States*, 289 U.S. 553 (1933), and *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), involved the problem of "legislative" courts; and the latter specifically found *no* problem under *Hayburn's Case* (370 U.S. at 582). *Mistretta v. United States*, 488 U.S. 361 (1989), involved rulemaking, not the adjudicatory judgments of Article III courts. *United States v. Mitchell*, 463 U.S. 206 (1983), involved the scope of a waiver of sovereign immunity and substantive liability of the United States.

The Court's decision in *United States v. Sioux Nation*, 448 U.S. 371 (1980), of course, *rejected* a claim based on *Hayburn's Case*. *Sioux Nation* is discussed below.

trict court had one set of laws to apply prior to *Lampf*, another set in the months after *Lampf*, and still another set after Congress restored the pre-*Lampf* limitations period. At every moment, however, the task for the court was entirely judicial in the fullest constitutional sense: the court's determination could itself provide relief, without need for further independent action by any non-Article III authority. Accordingly, there is no *Hayburn's Case* problem barring the district court from assuming jurisdiction, or having assumed jurisdiction, in this case.

2. Nevertheless, petitioners' entire separation-of-powers argument is that the principle of *Hayburn's Case* establishes a ground for invalidating statutes because of their effect on already-final judgments, even if those judgments, when rendered, resolved a perfectly proper case or controversy. *Hayburn's Case*, however, has never been so applied. Petitioners all but acknowledge this when they remark that "*Hayburn's Case* and its progeny are generally used to strike down statutes that provide for potential legislative or executive review of the future judgments of a tribunal." Pet. Br. 16. In fact, *every* one of the constitutional cases involved a statute creating the "potential" for non-Article III revision at the time of the judicial decision—indeed, the *need* for a non-Article III determination to afford relief. And in every such case, the Court's disposition was simply that the Article III courts could not take jurisdiction. In none of the cases did the Court invalidate, or even rule that it would be proper under *Hayburn's Case* to invalidate, a subsequently enacted statute, as petitioners seek here, because of its effect on a prior judgment.[10]

[10] *United States v. Klein*, due process, and perhaps other constitutional principles (*e.g.*, double jeopardy, full faith and credit) may set limits on subsequent legislation affecting judgments as such. With petitioners having properly abandoned their earlier contention under *Klein*, however, the only such argument raised by petitioners is their substantive due process challenge, which is considered below. Whatever the merits of any such arguments, they have nothing to do with the separation-of-powers principle of *Hayburn's Case*.

The *Hayburn's Case* principle not only never has meant, but could not mean, that Congress is barred from upsetting "a final judgment rendered by a court of the United States." Pet. Br. 10. For one thing, if the focus of *Hayburn's Case* were on the post-judgment action of executive or legislative authorities, then there would be no violation in all those situations where the judicial determination is simply ratified. But that is plainly not the law. *Hayburn's Case* does not require a wait-and-see approach, with post-judgment action by Congress or the Executive determining constitutionality. Rather, it is the known need for a later independent non-Article III determination, at the time of judicial decision, that creates the constitutional problem of a "non-judicial" task, making Article III jurisdiction improper regardless of any later action by another branch. That problem does not arise with a post-judgment statute if the judgment, when rendered, resolved what was then fully a case or controversy.

Indeed, petitioners do not deny that Congress is free to alter the law, rendering lawful certain conduct that was previously found to be unlawful and enjoined, and thereby compelling modification of the injunction judgment. *See Pennsylvania v. Wheeling & Belmont Bridge* Co., 59 U.S. (18 How.) 421 (1855); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454 (1870). Yet, as petitioners recognize when they observe that for Article III purposes "[a] judgment is a judgment" (Pet. Br. 27), the *Hayburn's Case* principle does not distinguish between judgments according to whether forward or retrospective relief is the subject of the case. For example, the principle of *Hayburn's Case* was fully applied in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., supra*, where the relief sought was a purely prospec-

tive order confirming a future entitlement to an air carrier route. If a statutory inability to grant relief makes a court's task non-judicial at the time of decision, the decision is not a constitutionally proper one for an Article III court to make, regardless of the type of relief sought.

The enactment of a statute affecting a previously rendered judgment, by contrast, does not implicate the principle underlying *Hayburn's Case*, because the character of a dispute as a "case or controversy" proper for "judicial" resolution cannot, as a logical matter, be altered by a post-judgment statute. That is why no *Hayburn's Case* problem arises with this Court's longstanding rule, beginning with *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), that a new statute must be applied while a case is on appeal, even in this Court (if the law is intended to be applicable to such cases). Pet. Br. 21-23.[11] In that situation, the enactment of the new law does not somehow retroactively render the lower court decisions merely advisory. The enactment of a new law after all appeals are exhausted is no different in terms of the case-or-controversy principle of *Hayburn's Case*: such a law no more renders the earlier judicial decisions "non-judicial" in nature.

Only a statute that, at the time of decision, makes the judicial determination "subject to later review or alteration" before relief can be obtained violates the principle of *Hayburn's Case* and thus justifies refusal to accept jurisdiction. *Chicago & Southern Air Lines*, 333 U.S. at 114. There was no such statute in this case. Accordingly, there is no warrant in *Hayburn's Case* for invalidating Section 27A(b).

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[11] In *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, *modified*, 331 U.S. 795 (1947), this Court applied that rule even after it rendered its decision, modifying its judgment to allow consideration of an intervening statute. *See* Pet. App. A32-A33.

B. Petitioners' argument under the principle of *Hayburn's Case* would fail even if that principle were treated as a possible ground for invalidating congressional action that revises an earlier judgment—a use to which this Court has never put the principle, which is outside the "case or controversy" rationale underlying it, and which is properly the concern of *United States v. Klein* rather than *Hayburn's Case*. Even so, however, the rule would apply, at most, only when Congress acts "as a court of errors," because only then can Congress be deemed to be usurping or impairing the courts' "judicial power." 2 U.S. (2 Dall.) at 410 n.1. *See United States v. Sioux Nation*, 448 U.S. at 427 (Rehnquist, J., dissenting) (Congress " 'may not itself exercise an appellate-type review of judicial judgments' "). Congress cannot be accused of assuming or interfering with the "judicial power" unless, at a minimum, it is engaging in adjudication, undertaking to "determine facts, apply a rule of law to those facts, and thus arrive at a decision"—these being "necessary . . . conditions for the exercise of federal judicial power." *Freytag v. Commissioner*, 111 S. Ct. 2631, 2655 (1991) (Scalia, J., concurring).[12] But Congress did no such thing when it enacted Section 27A(b).

Section 27A(b) is an exercise of legislative power: it changes the substantive rule of law for a generally defined set of circumstances and then leaves to the Article III courts the application of that rule in specific cases. Congress in Section 27A(b) did not find any facts about particular plaintiffs, did not interpret the *Lampf* statute of limitations or apply it to any plaintiffs, and did not even apply the newly enacted statute of limitations to particular plaintiffs—much less arrive at any decision, on any ground, fixing particular parties' rights. Adjudication

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[12] In all of the cases following *Hayburn's Case*, the contemplated post-judgment executive or legislative action was a case-specific determination, without change of substantive law. *See, e.g., Chicago & Southern Air Lines* (award of air route); *Ferreira* (damages award); *Hayburn's Case* (pension claim).

is left by Section 27A(b) to the courts, which must then follow the law that Congress is entitled to make to govern their proceedings. Thus, far from exercising "appellate-type review" by reversing judgments on the basis of existing law, or making any case-specific determinations of the result of particular disputes, Congress enacted new law and left the judicial power in the Article III courts.[13]

This Court has upheld much more case-specific legislation providing for reopening of otherwise-final judgments than Section 27A(b)—even reopening judgments in purely monetary cases. In particular, Congress specifically directed the reopening of an identified judgment of an Article III court in *United States v. Sioux Nation*, 448 U.S. 371 (1980).[14] This Court upheld the measure because Congress had changed the applicable law so as to remove a "non-merits" defense from the case, leaving resolution of the "merits," including all necessary fact-finding and application of law, to the courts.[15] The same

[13] "The legislature is not setting aside the court's original determination, which is final as to the law then existing. It is merely deciding that prior claimants should have another opportunity to file and to litigate their claims under a new and different set of standards." *State ex rel. Huntington Rubber Mills v. Sulmonetti*, 557 P.2d 641, 644 (Ore. 1976).

[14] *Sioux Nation* and *Cherokee Nation v. United States*, 270 U.S. 476 (1926), involved judgments of the Court of Claims, which was an Article III court. 28 U.S.C. § 171 (1976 ed.); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

[15] The Court reasoned that the law, which commanded consideration of the merits of the claim without regard to a preclusion defense that had already finally been held dispositive, constituted a waiver by the United States of its own defense. 448 U.S. at 395-405. In accord with this Court's recognition elsewhere that separation-of-powers protections of the Article III courts are not freely waivable (*CFTC v. Schor*, 478 U.S. 833, 851 (1986)), a separate section of the opinion in *Sioux Nation* rejected the *Hayburn's Case* argument without reference to the "waiver" notion. 448 U.S. at 406-07. The Court explained that the new claim was "in pursuit of judicial enforcement of a new legal right"—namely,

is true for Section 27A(b). Accordingly, in this case—as in *Sioux Nation*, as in the injunction cases (*e.g., Wheeling & Belmont Bridge*), as in cases upholding laws upsetting the finality of judgments of territorial courts or administrative tribunals[16]—the post-judgment legislation does not effect any improper impairment of the judicial function, and there is no threat to the structural or liberty-preserving values of judicial independence that Article III protects. *See CFTC* v. *Schor*, 478 U.S. 833, 848-50 (1986).

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Petitioners' second challenge to Section 27A(b) repeatedly invokes the notion of "vested rights." Pet. Br. 10, 29-49. But as this Court pointed out more than 100 years ago, there is no "vested rights" clause in the Constitution. *Campbell v. Holt*, 115 U.S. 620, 628 (1885).[17] Petitioners' claim, which is made under the due process clause of the Fifth Amendment, must be judged according to the substantive due process standards applicable to retroactive legislation. Section 27A(b) readily satisfies

the original takings claim minus the previously dispositive *res judicata* defense—and that Congress had not reviewed the "merits of the Court of Claims' decisions," but had left to the Court of Claims all factfinding and "application of generally controlling legal principles to those facts." *Ibid.*

[16] *See, e.g., Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160 (1864); *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222 (1833).

[17] "It is to be observed that the word 'vested right' is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution." 115 U.S. at 628.

those standards. And there is no basis for a wholly different rule giving sacrosanct or even categorically special status to laws that upset otherwise-final judgments, either generally or, even more particularly, for the type of judgment at issue in this case.[18]

A. The standard governing the assessment whether retroactive legislation violates due process is by now firmly established. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, '[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process': a legitimate legislative purpose furthered by rational means." *General Motors v. Romein*, 112 S. Ct. 1105, 1112 (1992), quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). *See also United States v. Sperry Corp.*, 493 U.S. 52 (1989); *Usery v. Turner Elkhorn Mining Co.*,

[18] In light of petitioners' reliance on cases decided under other constitutional provisions (*e.g.*, Pet. Br. 35, 37), we note that other constitutional provisions that have some bearing on "retroactive legislation" provide no help to petitioners. For example, the Ex Post Facto Clause (art. I, § 9, cl. 3) applies only to criminal laws. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). The Bill of Attainder Clause (art. I, § 9, cl. 3) applies at most only to laws singling out identified persons for punishment for past conduct. See *United States v. Lovett*, 328 U.S. 303, 315-16 (1946); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 475-76 (1977). The Contract Clause (art. I, § 10, cl. 1) is not applicable to Congress or to rights not resting on a contract; moreover, statutes like Section 27A(b) that *restore* parties to their reasonable expectations, rather than defeat contractually fixed expectations, have been upheld under the Contract Clause. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 419-20 (1983); *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965). Finally, no takings claim is made here, and any such claim would fail if due process presents no barrier to Congress's action removing the limitations bar to the litigation of the fraud claims on their merits. *See* note 4, *supra*.

428 U.S. 1 (1976). This test thus recognizes that settled expectations *can* constitutionally be upset, as long as the legislature is rationally pursuing a legitimate objective in doing so. *See Usery*, 428 U.S. at 16 ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations") (citing numerous cases); *R.A. Gray & Co.*, 467 U.S. at 730 ("burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose").

That standard is readily satisfied here. It was entirely legitimate for Congress to seek to protect the expectation interests of the thousands of plaintiffs who had relied on pre-*Lampf* limitations periods and pursued securities fraud claims, but had just recently had their cases dismissed (whether or not they had appeals pending), while at the same time preventing a host of alleged malefactors from escaping even having to answer fraud charges for which they might be liable in amounts in the billions of dollars. *See Securites Investors Legal Rights, supra*, at 3-6; 137 Cong. Rec. S18,623-24 (Nov. 27, 1991) (statement of Sen. Bryan). And the means adopted, recommended to Congress by the securities industry (note 3, *supra*), were precisely tailored to achieve those objectives. Indeed, as the court of appeals pointed out (Pet. App. A25), Section 27A(b) is a measure that, far from upsetting the expectations of the complaining party, affirmatively serves the very fairness interest in preserving expectations for which due process provides protection. *Cf. Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 113 S. Ct. 2085, 2089 (1993) (noting "difficult[y]" of *Lampf* issue and describing Section 27A, with no hint of disapproval).

B. Because Section 27A(b) so plainly meets the governing due process standard, and indeed impairs no legitimately settled expectations at all, petitioners' argument is, as it must be, that the due process clause re-

quires a special rule treating final judgments as sacrosanct. But this Court's decisions setting forth the modern standard for retroactive legislation, as quoted above, give no hint that judgment-based rights are outside the standard, let alone accorded the absolute protection without which petitioners' challenge to Section 27A(b) must fail. And neither precedent nor policy can justify petitioners' claim that this Court should now adopt a special constitutional standard, indeed an absolute one forbidding any legislative impairment of final judgments.

1. To begin with, precedent will not support petitioners' claim. As they acknowledge (Pet. Br. 40-41), this Court has on many occasions and for many reasons sustained laws upsetting final judgments. *See Fleming v. Rhodes*, 331 U.S. 100 (1947); *Hodges v. Snyder*, 261 U.S. 600 (1923); *Pennsylvania v. Wheeling & Belmont Bridge, supra*; *Paramino Lumber Co. v. Marshall, supra*; *Stephens v. Cherokee Nation, supra*; *Freeborn v. Smith, supra*; *Freeland v. Williams*, 131 U.S. 405 (1889); *Sampeyreac v. United States, supra*. These cases cannot be squared with petitioners' claim of categorical sanctity for judgment-based rights. Contrary to petitioners' suggestion (Pet. Br. 40), it is irrelevant, for *due process* purposes, that some of the cases, including some involving monetary claims, involved the judgments of territorial or administrative rather than Article III tribunals. Similarly, the fact that some of the reopened decisions were rendered during national emergencies (Pet. Br. 40) is relevant only in that the circumstance supplies part of the rationale for the reopening: the cases remain as proof that judgments have not been treated as sacrosanct.

If the Court's precedent undermines the claim of *absolute* protection for judgment-based rights, it also undermines a lesser claim of *privileged* status for judgment-based rights compared with other "vested" rights (although such a claim would be insufficient to support petitioners' attack on Section 27A(b) in any event).

Petitioners themselves identify various decisions invalidating laws that impaired non-judgment-based property interests deemed "vested." *See* Pet. Br. 31-32, 35-36 (citing, *e.g., Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338, 340 (1922); *Stewart v. Keyes*, 295 U.S. 403 (1935); *Coombes v. Getz*, 285 U.S. 434, 442 (1932); *Ettor v. City of Tacoma*, 228 U.S. 148, 156 (1913)).[19] Those cases, of course, date from an earlier era of substantive due process protection of property rights, an area now clearly governed by the rationality standard quoted above; but the statements petitioners cite about final judgments likewise come from an earlier era. *See* Pet. Br. 29-31 (quoting decisions from 1856, 1870, 1898, and 1923). In any event, the critical lesson is that the precedents undermine any claim that judgment-based rights have been afforded categorically greater protection than property rights not based on judgments. Indeed, this Court specifically said in *Fleming v. Rhodes*, 331 U.S. at 107, that "rights acquired by judgments have no different standing" for due process purposes than other "vested" rights, such as those gained by contract. *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 16 (citing *Fleming*, which involved a statute upsetting otherwise-final judgments, in setting forth current rationality test for retroactive legislation).

Against this background of case law (sometimes allowing disturbance of final judgments, while sometimes invalidating disturbance of other "vested" rights), it is hardly surprising that petitioners can identify no case in which this Court has *held* a statute invalid based on a distinctively absolute protection for judgments. Almost none of the flurry of Supreme Court decisions cited by petitioners even *says* anything about the protection of

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[19] Contrary to petitioners' suggestion, *Forbes* did not involve a "final" judgment (any more than did *149 Madison Ave. Corp.*, supra).

judgments as such at all.[20] Among those which do, *Pennsylvania v. Wheeling & Belmont Bridge*, *The Clinton Bridge*, and *Hodges v. Snyder* (all quoted by petitioners, *see* Pet. Br. 29-30, 31) each *upheld* laws that disturbed final judgments.[21] In the end, therefore, petitioners must rely almost exclusively on a passage from *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898). But that passage apparently is *dictum*, does not mention "due process" or actually rule on the constitutional validity of any statute allegedly disturbing a final judgment, and involves a statute enacted while a case was pending. Pet. Br. 30.[22] The broad statement from *McCullough*, which

[20] Notably, *Stewart v. Keyes*, *supra*, which petitioners quote at some length (Pet. Br. 32), involved protection of title to land, not protection of a judgment as such.

[21] *Hurtado v. California*, 110 U.S. 516 (1884), which petitioners also cite (Pet. Br. 30), merely held that the Fourteenth Amendment does not require States to use grand juries to lodge criminal charges.

[22] In *McCullough*, the Virginia Supreme Court ordered that judgment be entered against a bondholder suing to confirm his right to pay taxes with bond coupons. This Court concluded that the judgment had to be reversed because Virginia, in enacting a statute denying the tax-payment right granted upon the State's issuance of the bonds, had violated the Contract Clause. Virginia's final argument to avoid reversal was that, *while* the case was *pending* in the Virginia Supreme Court, the plaintiff's statutory cause of action had been repealed. This Court rejected that effort to avoid judgment on the Contract Clause challenge to the bond-impairing statute.

The Court first ruled that the state court had not in fact decided that the cause-of-action-repealing statute had any effect of abating the plaintiff's suit (a matter of state law) and, indeed, had taken action inconsistent with any such conclusion. Only then, having already given a sufficient reason for rejecting Virginia's argument, did the Court declare, in what was accordingly *dictum*, that the legislature could not "take away rights which have been once vested by a judgment." 172 U.S. at 123. Even that statement cited no authority or constitutional source, however, and ultimately led only to the conclusion that the repealing statute did not in fact affect the plaintiff's suit (again, apparently as a matter of inferred

is inconsistent with actual holdings and later doctrinal developments, is far from enough to support the special constitutional rule, as an exception to the generally applicable standard governing retroactive legislation, that petitioners ask this Court now to establish.

2. Petitioners offer no better reasons than they do precedent to support their claims of absolute, or even privileged, protection for judgments. A judgment, of course, may have the effect of creating a settled expectation that warrants protection under due process standards.[23] But it is the existence and magnitude of the protected interest, not whether the interest derives from a judgment, a contract, a property transfer, or some other source, that matters for due process purposes. There is no justification for a rigid distinction between judgments and other sources of protected interests that would give the former automatically privileged, or sacrosanct, status.

Absolute sanctity for judgments would, indeed, be inconsistent with Rule 60(b), Fed. R. Civ. P., which grants "authority adequate to enable [courts] to vacate judgments whenever such action is appropriate to accomplish justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (internal quotation marks omitted). As petitioners acknowledge, that authority has been used to reopen judgments for a variety of reasons, including changes in governing law. Pet. Br.

legislative intent). Of course, since the statute was enacted while an appeal was pending in the normal sense involved in *The Schooner Peggy*—and petitioners' citations offer no support for their assertion that an appeal in Virginia is different from an appeal elsewhere (Pet. Br. 30 n.34)—the statement in *McCullough* was concededly wrong in the context where it was made.

[23] A judgment may, under the relevant law defining property rights, also give a litigant title to certain real or personal property and, in that event, give rise to a right under the Takings Clause that otherwise might not exist. But the Takings Clause is not at issue in this case, which does not involve any title to identified property.

48 n.53; *see* Pet. App. A21; *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989); *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987); *McGrath v. Potash*, 199 F.2d 166, 167 (D.C. Cir. 1952); *cf. Polites v. United States*, 364 U.S. 426, 433 (1960) (reserving question). Such limitations on the finality of judgments, enabling litigants to obtain relief outside the normal course of appeals, have a long history. *See* 7 J. Moore, J. Lucas & K. Sinclair, *Moore's Federal Practice* ¶ 60.09 *et seq.* (2d ed. 1993).[24] Whatever the precise scope of Rule 60(b), petitioners can hardly claim an absolute constitutional protection for their judgment when even the non-constitutional protections of finality, present and past, stop considerably short of according rigid finality to judgments outside the avenue of direct review.

Even granting a privileged, though less than absolute, status to judgments—which would not be enough to strike down Section 27A(b) and which petitioners never seek to define—could not be justified in terms of the relevant interest protected by substantive due process: the

[24] In particular, it is clear that under the former federal scheme providing for district courts to sit for specified "terms," the dismissal judgment in this very case would have been open to revision when Congress enacted Section 27A(b), because a district court had plenary authority to alter its judgments during the same term. *See* 6A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.04, at 60-31 (2d ed. 1993); 7 *id.* ¶ 60.09, at 60-65; *Hill v. Hawes*, 320 U.S. 520, 524 (1944) (district court, during term, could take "such action as was in the interest of justice to a party to the cause"). In the Northern District of Texas (Dallas division), the term that began on the first Monday in May lasted until the next term began on the second Monday in January. *See* 28 U.S.C. § 189 (1940 ed.); 28 U.S.C. § 139 (1952 ed.); *Harlan v. McGourin*, 218 U.S. 442 (1910); *United States v. Perlstein*, 39 F. Supp. 965 (D.N.J. 1941), *aff'd*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942). Under that system, the dismissal order in this case (entered in September) would still have been subject to revision when Congress changed the relevant limitations period in December of the same year.

interest in leaving settled expectations undisturbed. *See General Motors v. Romein*, 112 S. Ct. at 1112. Petitioners can point to no sound basis for concluding, with support sufficient to undergird a distinctive constitutional rule, that final judgments categorically and uniformly generate stronger settled expectations than other kinds of rights, such as contractual or property rights. This case is a good example: petitioners' expectation that their dismissal would permanently bar Pacific Mutual's 10b-5 claims cannot have been very firm or definite (compared, *e.g.*, to a bond purchaser or an occupant of land with longstanding title): petitioners obviously knew that they had received a windfall from an unexpected change of law[25]; and congressional efforts to respond to the concededly unexpected effects of *Lampf* were under way even before this case was dismissed.[26] More broadly, petitioners have not, and likely could not, make any showing that nonconstitutional sources of law generally accord property rights derived from judgments privileged legal status over other sorts of property rights.[27]

[25] Petitioners do not assert the contrary in their brief. Pet. Br. 47-48. Nor could they, since they did not include a timeliness argument in the motion to dismiss that they filed before *Lampf*; only after *Lampf* did they raise a limitations defense. *See* page 2, *supra*.

[26] *See* Pet. Br. 4 n.2; 137 Cong. Rec. S10,691 (daily ed. July 23, 1991) (remarks of Sen. Bryan) (introducing S. 1533, which, among other things, permitted "the prompt refiling of any case dismissed based on Lampf"); 137 Cong. Rec. E2,843 (daily ed. Aug. 2, 1991) (remarks of Rep. Markey) (introducing H.R. 3185, which likewise permitted refiling). *See also* note 3, *supra*; *United States v. Darusmont*, 449 U.S. 292, 295-98 (1981) (retroactive taxes often upheld for period of legislative process).

[27] For example, judicial liens do not have any general priority over liens arising from contracts. *See, e.g.*, D. Epstein, J. Landers, & S. Nickles, *Debtors and Creditors* 9, 48, 346 (3d ed. 1987); *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989). Similarly, under 11 U.S.C. § 506, the central provision of the Bankruptcy Code concerned with liens, there is generally "no distinction between consensual and nonconsensual liens." *Ron Pair*, 489 U.S. at

Finally, a categorical protection for judgments would produce not just arbitrary but perverse results: such a rule would punish the diligent and responsible. It would punish the diligent, because individuals who pressed their rights through suit but then lost, even on an unexpected basis resulting from a change of law, would be worse off than individuals who never sued at all.[28] It would punish the responsible, because individuals who decided not to appeal when no grounds existed at the time would be worse off than individuals who pursued an appeal (and then a certiorari petition) solely for the purpose of keeping the case alive so that new legislation could be applied under the rule of *Schooner Peggy*—as Pacific Mutual could have done here.[29] The Constitution should not preclude Congress from deciding that fairness warrants treating similarly situated people similarly, rather than disfavoring those who most actively promoted their rights

242 n.5. Prior to the current Code, bankruptcy law often gave *less* protection to judgment-based liens than to consensual liens. *Id.* at 246-48; *id.* at 253-54 (O'Connor, J., dissenting). At least one provision of the current Code likewise gives less protection to judgment-based liens than to consensual liens. 11 U.S.C. § 522(f); *see Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991).

[28] The Oregon Supreme Court made this point in construing a retroactive law in a case similar to the present one: "It is unlikely that [the legislature] would have wanted to open the door to previously injured workmen for whom the time for filing had elapsed under the prior law but who had never filed a claim, and yet not wanted to open the door to claimant, who had at least been diligent enough to file a claim, albeit too late." *State ex rel. Huntington Rubber Mills v. Sulmonetti*, 557 P.2d at 643.

[29] The judgment of dismissal in this case was entered in early September 1991. The filing of an appeal (and, if necessary, a certiorari petition) would readily have kept the case alive until December 19, 1991, when Congress enacted Section 27A. Indeed, not even counting the time for the Fifth Circuit to act on any such appeal, the total of 30 days allowed for the notice of appeal (Fed. R. App. P. 4) and 90 days allowed for a certiorari petition (28 U.S.C. § 2101(c); S. Ct. R. 13.1) would have been enough for the case to be still pending when Section 27A took effect.

or refrained from filing appeals solely for delay's sake. That fair and sensible course of action should not be foreclosed by according magical significance to a judgment that has become final through the exhaustion of opportunities for direct appeal.

C. Even if this Court were to conclude that *some* types of judgments warrant special, or even absolute, due process protection, the particular type of judgment at issue here is the very last sort that deserves special protection against legislation like Section 27A(b). For one thing, the affected judgments, aside from being quite recent, neither confirmed title to some specific property nor even awarded money, but instead had only one concrete effect: to give the defendants a future protection against having to answer securities-fraud charges under 10b-5. And the statute did no more than to enable the plaintiffs to obtain a just adjudication of those charges.

In this respect, the validity of Section 27A(b) follows *a fortiori* from *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940). There, the Court upheld a statute that directed the reopening of a specific damages dispute between private parties after an adjudication (by an administrative tribunal) that was by law deemed "final" when no judicial review was sought (33 U.S.C. § 921), that this Court subsequently cited as a final judgment (*Fleming v. Rhodes*, 331 U.S. at 107 n.12), and that had the preclusive effect of a final judgment (*see University of Tennessee v. Elliott*, 478 U.S. 788 (1986); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966)). If the judgment-based expectations of repose could be unsettled in *Paramino* to make possible a fair adjudication of claims, the judgments affected by Section 27A(b) can surely be reopened as well.

The effect of Section 27A(b), moreover, is not even to require redetermination of a specific issue previously decided by the courts. The affected judgments rest on the determination of precisely one issue, and new legislation has changed the governing law on that issue to

make the prior determination immaterial. Thus, in substance Section 27A(b) does no more than provide the affected 10b-5 plaintiffs with a new claim—for securities fraud with a new limitations period.[30] And that claim would not appear to be precluded by the prior dismissal even under ordinary preclusion principles, at least not clearly so.[31] In these circumstances, it is wholly implausible to attribute such finality to the earlier judgment as to claim a *constitutional* right to immunity from having to answer the altered claim, which in its current form was not, and could not have been, litigated in the original action. *Cf. Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948) (collateral estoppel "is not meant to create vested rights in decisions that have become obsolete or erroneous with time").

Finally, and of course most concretely, the sole issue on which the judgment rests is a statute of limitations—one, in fact, that indisputably came as a surprise to all of the parties here. This Court has often noted the distinctively weak character of rights assertedly "vested" as a result of a procedural or administrative defect, including timeliness bars. *See, e.g., Paramino Lumber Co.*, 309 U.S. at 378; *Graham v. Goodcell*, 282 U.S. 409, 427, 429-30 (1931). The reasons are simple. Disturbing a "repose" that rests on limitations grounds does not make unlawful any conduct that was lawful at the time or otherwise alter underlying legal entitlements or duties. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (classically retroactive law "alter[s] the *past* legal consequences of *past* actions").[32] For example, petitioners' conduct either constituted securities fraud violating 10b-5 or not, regardless of whether Pacific Mutual's subsequent lawsuit was timely under *Lampf*. And as the Court observed in *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945), it is implausible to suggest that the affected defendants' "conduct would have been different if the present rule had been known and the change [made by Section 27A(b)] foreseen."[33]

Because statutes of limitations "represent expedients, rather than principles" (*Chase*, 325 U.S. at 314), "it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment." *Id.* at 316.[34] There is simply no good reason for

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[30] To the extent that Rule 41, Fed. R. Civ. P., treats a statute of limitations as part of the "merits," as petitioners note (Pet. Br. 46), that treatment makes it all the more appropriate to characterize Pacific Mutual's 10b-5 claim as a new claim after the enactment of Section 27A(b).

[31] The "new" 10b-5 claim would not be subject to issue preclusion because the only issue decided in the judgments of dismissal—the application of the *Lampf* limitations period—is no longer part of the claim. And claim preclusion would be inconsistent with the principle that a judgment in a case does not preclude claims that could not have been brought in that case: plaintiffs could not have brought their new claim, with its new statute of limitations, before December 1991. *See* Restatement (Second) of Judgments § 20 Comment k, § 24 & Comment f, § 26(f) & Comment i (1982).

[32] Historically, statutes of limitations have been treated as "procedural" for choice-of-law and other purposes. *See Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Bournias v. Atlantic Maritime Co., Ltd.*, 220 F.2d 152 (2d Cir. 1955); Restatement (Second) of Conflict of Laws §§ 142, 143 (1971). One consequence has been that there is no guarantee of freedom from having to answer the substance of a claim, or freedom from liability, based on a dismissal for untimeliness of the suit, because the same claim might be permitted in another jurisdiction. 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.409[6], at III-162 (2d ed. 1993); Restatement (Second) of Conflict of Laws §§ 142, 143; Restatement (Second) of Judgments § 19 Comment f.

See also Block v. North Dakota, 461 U.S. 273, 291-92 (1983) (limitations bar does not determine underlying title to real property).

[33] That is so not only because conduct cannot be presumed to be determined by limitations periods, particularly those unexpectedly shortened by judicial decision after suit is filed, but also because other claims—here, Pacific Mutual's common-law fraud claims—may survive under a longer limitations period.

[34] The Court in *Campbell v. Holt*, 115 U.S. at 628, specifically rejected the notion that "a right to defeat a just debt by the

a different conclusion for those plaintiffs who had the lapse of time adjudicated against them before the legislature lengthened the period. There is still less reason for a different result where, as here, the superceded claim-barring limitations rule was itself the result of an unexpected judicial decision and the curative statute merely restored all parties to their original expectations. Section 27A(b), as such a statute, should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted, and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. . . . No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost." *See also Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976) (following *Chase*).